JUDICIAL CRITICISM OF LEGISLATION BY COURTS

I.

IN THE application of the doctrine of judicial review of legislative acts, the federal courts of the United States have not infrequently been criticised for usurping part of the functions of the legislature.[1] The criticisms have increased to such an extent as to raise an issue of national significance. Recently, charges against the judiciary for the usurpation of legislative functions have been made rather frequently by the justices of our federal Supreme Court. The late Associate Justice HARLAN, dissenting in part from the reasoning of the majority of the court in the *Standard Oil* case,[2] brought such a criticism against his associates. "The court, by its decision, when interpreted by the language of its opinion," he declared, "has not only upset the long-settled interpretation of the Sherman Anti-Trust Act, but has usurped the constitutional functions of the legislative branch of the government. * * * After many years of public service at the National Capitol, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction."[3]

A similar opinion was rendered by him in the case of *United States* v. *American Tobacco Company*.[4]

This emphatic protest from one of the most honored members of the highest judicial tribunal came as a shock to many who heretofore had implicit confidence in the opinions and judgments of the Supreme Court. It has tended to give greater emphasis to the contention on the part of many outside of halls of justice that the federal judiciary has assumed functions beyond the realm which belongs to the courts and has definitely invaded the field of the legislative department of government.

It is a mistake to suppose that Justice HARLAN was comparatively alone in the expression of this view that the federal courts are invading the legislative field. A survey of the decisions of the Supreme Court on constitutional issues since 1870 reveals a well-considered and deep-set conviction in the minds of an increasing

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[1] For instances prior to 1870, see Haines, Conflict Over Judicial Powers, Columbia University Studies, Vol. XXXV, No. 1.

[2] Standard Oil Company v. United States, 211 U. S. 1.

[3] Ibid, 83, 105.

[4] Ibid, 189.

number of justices that the federal courts are interfering with matters not properly within the judicial realm. The purpose of this paper is to indicate how frequently and emphatically other members of the court have declared themselves against decisions which were destined to involve the judiciary in political issues and entangle lawyers in the subtleties of social and economic theories. An examination of the views of those who have favored hewing to the line of a more restricted judicial policy tends to disclose one of the causes for the recent attacks upon court decisions and the increasing opposition to the American doctrine of judicial supremacy.

The determination by the federal courts of social and economic policies, frequently presented for adjudication, has brought about some marked differences amongst the justices which are evidenced in elaborate dissenting opinions. These opinions in so far as they relate to the question whether the courts are usurping or encroaching upon the functions of the legislative department will be briefly reviewed. No effort will be made to discuss the issues presented in the cases selected or to attempt an analysis of the fundamental differences betwen the majority and the minority. The cases will be considered only as they relate to the division of functions between the two great departments of government, and attention will be directed only to that part of the opinion which bears upon what is now known as the usurpation or invasion of legislative functions by the judiciary.

A majority of the cases involving questions in the realm of what may be termed judicial legislation has arisen in the last two decades. A few cases, however, of great importance occured prior to 1890, in which important issues of recent years were foreshadowed. Immediately following the Civil War, with the re-establishment of the ordinary relations of peace, a series of causes arose which called for a rather definite determination of the relationship between the various departments of the federal government. This series of cases involved the issue between the strict and loose policies of construction of constitutions and statutes, and the determination whether or not the federal courts were to assume increasing responsibilities of a quasi-legislative nature.

In the first of the famous *Legal Tender Cases*[5] when the majority of the court had decided against the constitutionality of the laws granting authority to issue legal tender notes, Justice MILLER, speaking for himself and three other members of the minority, maintained that a large part of the argument advanced by the court in its opinion "is too abstract and intangible for application to courts of justice,

[5] Hepburn v. Griswold, 8 Wall. 603.

and is, above all, dangerous as a ground on which to declare the legislation of Congress void by a decision of a court. It would authorize this court to enforce theoretical views of the genius of the government, or vague notions of the spirit of the Constitution and of abstract justice, by declaring void laws which did not square with those views. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the national legislature."[6]

A reconstituted court held the laws valid on the theory that since there were no prohibitions against the enactments by Congress, the matter should be left to the discretion of the legislative department.[7] Laws, the court maintained, were not to be annulled unless there was no room for reasonable doubt regarding invalidity. In the affirmation of the *Legal Tender Cases* a few years later, the Supreme Court not only upheld the previous decision,[8] but stated so forcefully the argument for an almost unrestricted power of Congress, that, had the principle of this case prevailed, there would have been little chance for judicial control of the legislative department of the federal government.

Not many years later, in an effort to overthrow a slaughter-house company of New Orleans which had been granted a monopoly by the State, the court was asked to interpret the new amendments to the Constitution so as to nationalize individual liberty and place within the reach of the federal courts the entire realm of security to person and protection of property.[9]

But, just as the Court had refused to interfere with Congress in its financial policy, so again it refused to apply the terms of the Thirteenth, Fourteenth, and Fifteenth Amendments so as to interfere with State legislation. These amendments were interpreted as an attempt to secure equal rights to the negro race. "No one can fail to be impressed," said the Court, "with the one prevading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."[10] The State governments were consequently

[6] Wall. 638.

[7] Legal Tender cases, 12 Wall., 457; Justice Field in his dissent ably defended the doctrine that in matters relating to private rights the courts were intended to revise the determination of the other departments of government. See p. 648.

[8] Juilliard v. Greenman, 110 U. S. 421.

[9] The Slaughter-House Cases, 16 Wall., 36.

[10] 16 Wall., 71.

upheld in the rights and privileges which they had exercised before the war with the single exception noted. It was emphatically denied that it was the intention of these amendments to change the main features of the federal system. The Supreme Court seemed inclined to allow the legislatures of state and nation a wide range of choice and an almost unrestricted power in the determination of questions of important political bearing.

Four members of the court, however, took issue with the majority and maintained with great emphasis that the Fourteenth Amendent was intended to protect people against monopolies and to secure equality of rights in pursuing the ordinary avocations of life. Justice FIELD in his dissent observed, "it is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivations of their common rights by state legislation. In my judgment the Fourteenth Amendment does afford such protection."[11] Justice FIELD thus seemed willing to accept the view urged by counsel in *Murdock* v. *Memphis* that it was intended "to place the whole jurisprudence of the country under the protection of this great tribunal of the nation."[12] It was reserved for later decisions to bring into favor and to give official sanction to the view of the minority in these cases and to throw the burden of control of an increasingly complex economic life rather upon the judiciary than the legislature.

A question somewhat similar in nature raised in *Munn* v. *Illinois*[13] and the *Granger Cases* [14] led to a strong opinion against judicial interference with the discretion of state legislative bodies. In accordance with a constitutional provision the Assembly of Illinois had fixed the maximum charge for the storage of grain in Chicago. On the issue that the Fourteenth Amendment had been violated the Supreme Court was asked to declare this law null and void. When the argument was presented that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question, the answer was given by the court that the practice has been otherwise; that "in countries where the common law prevails it has been customary from time immemorial for the legislature to declare what shall be reasonable compensation under such circumstances, or, perhaps more properly

[11] 16 Wall., 89.
[12] 20 Wall., 590.
[13] 94 U. S. 113.
[14] 94 U. S., 155, 164, 179, 180.

speaking, to fix a maximum beyond which any charge made would be unreasonable."[15] It is confessed that this power may be abused, but for protection against abuses by legislatures, the court replied, "the people must resort to the polls, not to the courts."[16] In short, the issue was regarded as a political question, and was thrown back to the political departments of the government. A dissenting opinion by Justices FIELD and STRONG emphasied the importance of a judicial determination of questions of this nature. The decision was condemned as "subversive of the rights of private property, heretofore believed to be protected by constitutional guarantees against legislative interference."[17]

The attitude of the majority of the court, however, seemed to be decidedly in favor of allowing a free hand in matters of legislation. One decision had affirmed the doctrine that in most matters of policy and expediency when there was no direct prohibition in the Constitution, Congress was the sole and final authority. Another had denied that the new Amendments to the Constitution were intended to shield property holders or individuals from that government control which had existed heretofore. And the Supreme Court had finally refused to restrict the attempts of the states to regulate monopolies and deal with exclusive corporations even when such legislation had fixed a maximum charge which was believed to be unreasonable. The legislatures of state and nation were thus to be quite free to deal with the important issues of policy which an era of peace, prosperity, and expansion had brought up for immediate solution.[18]

Some years earlier there were indications of a change in the judicial attitude of liberality toward state enactments. The states and cities of the West began to embark upon schemes of improvement supported and encouraged by government funds. The conservative forces of these communities and elsewhere regarded these measures as dangerously radical and injurious to the body politic, and the development of this type of legislation was viewed with great alarm. As early as 1874 the Supreme Court was called upon to

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[15] 94 U. S., 133.

[16] 94 U. S., 134.

[17] Ibid., 136; In Stone v. Wisconsin, 94 U. S. 181, 186, it was again maintained by the minority that the court's decision was wrong and that "it will justify the legislature in fixing the price of all articles and the compensation for all services. It sanctions intermeddling with all business and pursuits and property in the community, leaving the use and enjoyment of property to be regulated according to the discretion of the legislature."

[18] Before a rather distinct change of attitude is noticeable in the decisions of the federal courts a very important case was determined in favor of the exercise of a degree of ultimate discretionary power to be exercised by the national legislature in the unanimous approval of an income tax. Springer v. United States, 102 U. S. 586.

interfere.[19] The council of Topeka, Kansas, had passed an ordinance looking toward the development and improvement of the city either by direct appropriation from the general fund or the issuance of bonds by the city. The contest over aid to railroads by taxation was reviewed by the court and the decision announced by Justice MILLER that when a tax can no longer be justly claimed to have a public character, when it is shown to be in aid of private or personal objects, the law authorizing it is beyond the legislative power. The conclusion was then reached that there can be no lawful tax which is not laid for a public purpose and that determination of what is a public purpose was clearly asserted to be a judicial and not a legislative question. Justice CLIFFORD took occasion to criticise the majority opinion on the ground that "Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to prevade or underly the Constitution, where neither the terms nor the implications of the instrument disclose any such restrictions. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism. * * * Unwise laws and such as are highly inexpedient and unjust are frequently passed by legislative bodies, but there is no power vested in a circuit court nor in this court, to determine that any law passed by a state legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States."[20]

A more positve intention to exercise a censorship over state legislation was shown in a series of decisions beginning with *Chicago Milwaukee & St. Paul Railway Co.* v. *Minnesota*.[21] The State of Minnesota had placed in the hands of a commission the power to determine the reasonableness of railroad rates, and from the decision of the commission there was no appeal. The opinion of the commission was final and conclusive as to what was to be lawful, equal or reasonable charges. In accordance with the language and judgments of the Supreme Court in earlier cases this was regarded by the state as a legislative question, left solely to the discretion of the state and therefore not subject to judicial review. The corporation, however, resisted the action of the commission and claimed

[19] Loan Association v. Topeka, 20 Wall., 655; Justice Miller here laid himself open to the charge of interfering with legislation without sufficient constitutional warrant along lines similar to those which he had seen fit to condemn in his dissenting opinion in the Hepburn case.

[20] 20 Wall 669, 670.

[21] 134 U. S. 418.

that under the provisions of the Fourteenth Amendment the statute of the state was in conflict with the federal Constitution.

The contention of the corporation was upheld by the majority of the court in an opinion of Justice BLATCHFORD because in his judgment the state law deprived the company of its rights to a judicial investigation by due process of law, and substituted therefor, as an absolute finality, the action of a railroad commission which in view of the powers conceded to it by the state court, could not be regarded as clothed with judicial functions or as possessing the machinery of a court of justice. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving the element of reasonableness both as regards the company and as regards the public, the court held, was eminently a question for judicial investigation. If the company was deprived of its power of charging reasonable rates for the use of its property, and such deprivation took place in the absence of an investigation by judicial machinery, the whole procedure was a deprivation of property without due process of law and a denial of equal protection of the law.[22]

The dissenting opinion of Justice BRADLEY, concurred in by Justices GRAY and LAMAR, is noteworthy. It was asserted that the majority opinion of the court practically overruled *Munn* v. *Illinois* and other railroad cases decided by the court; that the governing principle of those cases was that the regulation of railroad rates is a legislative and not a judicial question. The argument of Justice BRADLEY was summed up as follows:

"But it is said that all charges should be reasonable, and that none but reasonable charges should be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is preeminently a legislative one, involving considerations of policy as well as of remuneration, and is usually determined by the legislature by fixing a maximum of charges. * * * If this maximum is not exceeded, the courts cannot interfere. * * * Thus the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where reasonableness is left open, that the courts have jurisdiction of the subject. I repeat: when the legislature declares that the charges shall be reasonable, or which is the same thing, allows the common law rule to that effect to prevail, and leaves the

[22] 134 U. S. 458 passim; Justice Miller concurred in the judgment, expressing his own views which differed from the majority opinion, but not sufficiently he thought to call for a dissenting opinion; by this tme he had become sufficently imbued with the necessity of favoring the exercise of an extensive judicial review to aid in a reversal of the doctrines formerly announced by the court.

matter there, resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

"This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary, I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial. * * *

"It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulations of fares and freights of railroads and the charges of other public accomodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make.

"It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose. * * *[23]

"It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society, but such is the constitution of of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands, they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads

[23] Justice Bradley noted that an invasion of property rights involving fraudulent behavior or a direct confiscation of property would undoubtedly call for interference by the courts because the Constitution clearly provided for protection against such invasions.

and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public."[24]

The decisions in the *Loan Association* and the *Minnesota railroad* cases clearly indicated that it was the intention of our federal courts to revise and control the legislative enactments of the states especially so far as they related to the ownership, control, and disposition of private property. The precedents were established which gave encouragement to individuals and corporations to appeal beyond legislatures to the citadel of judicial protection. Courts were henceforth to accept the responsibilty of approving or disapproving enactments which resulted from the attempt to bring under subjection the harmful tendencies which inevitably follow in the wake of a rapid social and industrial development.

The issue thus raised as to the powers which rightfully belong to the legislative department of government and those which rightfully belong to the judicial department was determined first in favor of the legislature and then, by a reversal of decisions, in favor of the judiciary by the deciding vote of one or two members of the Supreme Court. Unquestionably each party in the controversy could turn to the past and cite instances to bear out the interpretation which seemed from one point of view to be the only correct conclusion. In the interpretation of the contract clause of the Constitution and the due process of law provision the courts early began to exercise a censorship over a wide field of state legislation and it needed but a slight extension of former practice to bring within the realm of judicial control an ever expanding series of governmental functions. The general terms of the Fourteenth Amendment relative to the deprivation of life, liberty or property without due process of law and the denial of equal protection of the laws gave in the judgment of one party the desired sanction to the growing powers of the courts in the determination of the trend of governmental policy.

It is especially significant to note, however, that able jurists could find sufficient precedents in the past and strong arguments from the standpoint of reason to maintain that courts were exceeding their rightful function when they assumed to determine questions of policy by declaring void acts of legislatures as unwise or unjust because the acts were held to be contrary to rather vague and indefinite constitutional provisions. It was the firm belief of these justices that the time honored function of courts and the special

[24] 134 U. S. 462-3, 465, 466.

powers allotted to our own judiciary did not require the determination of the justice or the injustice, the expediency or the inexpediency, of legislation. Courts would necessarily be obliged and expected to consider cases involving a direct confiscation of property or fraudulent methods resulting in injury to private rights, but the mere question of the difference of opinion regarding rightful compensation for services which the state ought lawfully to regulate was held to be wholly beyond the realm of judicial inquiry. Due warning was given regarding the dangers and difficulties which a wide judicial review would create.

II.

The attitude of the judiciary on the line of demarcation between judicial and legislative powers, as revealed in some important decisions from 1870-90, indicates a change favorable to a rather extensive judicial review. Some notable opinions of Supreme Court justices since 1890 on issues involving a conflict of authority between the two departments will show the tendency manifested in more recent cases.

Income Tax Cases. The income tax cases furnished one of the first great controversies in this period which reveals the extent to which legislative discretion may be subjected to judicial review. In *Springer* v. *United States*[25] the Supreme Court had unanimously upheld an income tax as constitutional. But during the period immediately following, great industrial progress had been made and the judiciary was becoming more cautious in approving immature and hasty legislation. Hence, when a second income tax law, somewhat carelessly and inadvertently drawn, was presented for consideration the Court first upheld the legislation with the exception of certain provisions relating to taxes on income from real estate and municipal bonds which were declared invalid. On a rehearing by the close vote of five to four the entire act was held null and void.[26] The emphatic language of the dissenting justices suggests the undesirability of the court interfering with legislative discretion in cases of this character.

Justice WHITE began his dissenting opinion with the following statement:

"My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one 'more honored in the breach

[25] 102 U. S. 586.

[26] Pollock v. Farmers Loan and Trust Co., 157 U. S. 429; 158 U. S. 601.

than in the observance.' The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort. This consideration would impel me to content myself with simply recording my dissent in the present case, were it not for the fact that I consider that the result of the opinion just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years, and which has been recognized by repeated adjudications of this court."[27]

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by court decisions, Justice WHITE thought, could not be better illustrated than by the example which this case affords.[28] The conservation and orderly development of our institutions, it was said, "rests on our acceptance of the results of the past and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. * * * Break down this belief in judicial continuity and let it be felt that on great Constitutional questions this court is to depart from the settled conclusions of its predecessors and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."[29] Justice HARLAN also offered a dissenting opinion.

Since the Justices divided equally on several points presented in the first case, a rehearing was soon granted and after full argument the entire act was invalidated by including the tax on personal property as a direct tax. Justice HARLAN prepared the dissenting opinion in which the views of Justice WHITE were approved and additional evidence was offered to refute the majority opinions. To the contention of counsel that the statute imposing the income tax was an assault by the poor upon the rich, Justice HARLAN responded: "By much eloquent speech this court has been urged to stand in the breach for the protection of the just rights of property against the advancing hosts of Socialism. With the policy of legislation of this character, the court has nothing to do. That is for the legislative

[27] 157 U. S. 608.
[28] Ibid. 638.
[29] Ibid. 650-2.

branch of the government. It is for Congress to determine whether the necessities of the government are to be met, or the interests of the people subserved, by the taxation of incomes. With that determination, so far as it rests upon grounds of expediency or public policy, the courts can have no rightful concern. The safety and permanency of our institutions demand that each department of government shall keep within its legitimate sphere as defined by the supreme law of the land. We deal here only with questions of law. * * *

"The practical effect of the decision to-day is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless."[30]

The Supreme Court was charged not only with attempting to supervise the action of the legislature upon questions of public policy, but also with favoring vested interests and property rights at the expense of the rights of the general public. It was thought to be especially serious that the Supreme Court by a new interpretation of the Constitution had tied the hands of the legislative branch of the government in the important matter of taxation, which in an emergency might be vital to the very existence of the Union unless the people by an amendment granted the necessary relief.

Insular Cases. Some years later in the *Insular Cases*[31] involving the legality of duties upon imports from Porto Rico in accordance with the Foraker Act, the Supreme Court manifested a more favorable attitude toward legislation than was previously accorded in the cases relative to federal taxation of incomes. But in lengthy dissenting opinions four justices charged the majority of the court with an inclination to go beyond the field of judicial inquiry and to settle questions political in nature. Chief Justice FULLER speaking for the minority insisted that the issues presented furnished no basis for judicial judgment.[32] The argument which was based upon the desirability of granting wide powers to Congress over newly acquired territories was held to be purely political and hence not a matter for judicial inquiry. Justice HARLAN contended that "the people of the United States who ordained the Constitution never supposed that a

[30] 158 U. S. 674, 685.
[31] Downes v. Bidwell, 182 U. S. 244.
[32] Ibid., 374, 375.

change could be made in our system of government by mere judicial interpretation: * * * I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel."[33] In *Dooley* v. *United States,* where the legality of duties on goods imported into Porto Rico from New York was raised, Chief Justice FULLER with the concurrence of three associates again dissenting, maintained that "the plain language of the Constitution should not be made 'blank paper by construction,' and its specific mandate ought to be obeyed."[34]

In *Hawaii* v. *Mankichi* wherein the provisions in amendments to the Constitution requiring indictment by grand jury and trial by petit jury were held not to apply to our colonial possessions Justices FULLER, HARLAN, BREWER, and PECKHAM again dissented. "It has been announced by some statesmen," Justice HARLAN remarked, "that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly import, but what the apparent necessities of the hour, or the apparent majority of the people at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution. * * * It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid. * * * Any other construction of the resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law."[35]

While the basis of the dissenting opinions in the *Income tax* and *Insular Cases* was on different grounds, in one respect the same principle was involved. In the *Income Tax Cases* the main emphasis of the protest of the minority was that the court was obliged to make a new rule different from any previous court decision or any legislative enactment, in order to invalidate the law of Congress. In the *Insular Cases,* the minority held that the law of Congress was plainly invalid in the light of the well settled interpretation of the law and Constitution of the United States. To uphold the law, it was here maintained that new legal rules had to be developed and sanctioned. In the former, the court reversed an earlier decision, overruled an act of Congress, and formulated a new legal rule which an amendment to the Constitution alone can remove. In the latter an act of Congress which was certainly of doubtful validity was upheld on a doctrine which openly approved

[33] Ibid., 386, 391.
[34] 183 U. S. 151, 173.
[35] 190 U. S. 197 at 241, 249.

the practice of judicial expansion of legal rules. The two cases in contrast furnish a good illustration of the difficulty of submitting primary questions of policy to a court of justice for final arbitrament.

State and Federal Relations. There is no field in which more perplexing controversies have arisen before the federal courts than in cases dealing with federal relations. The line of division between the functions which belong to the nation and those which belong to the state has brought to the judiciary frequently issues of a quasi-political nature. A few very recent cases indicate the impression that prevails among Supreme Court justices that the federal courts in the realm of federal relations are legislating by judicial decisions.

In a recent case relative to state taxation of national bank stock, Justices FULLER, BREWER, BROWN, and PECKHAM maintained, dissenting from the majority opinion of Justice WHITE, that "in the face of the plain words of the Constitution and the statutes, the clear language of the Supreme Court of California, and the absence of allegation or proof of actual discrimination, this court, by its opinion, strikes down the whole system of California for the taxation of shares of national banks."[36] It was a matter to be deplored, thought the minority, that to all intents and purposes the Supreme Court by its decision was granting a favor to national bank property denied to all other property in the country. A similar criticism was made by Justice HARLAN when a decision was rendered on the issue whether a state can impose a tax upon railway companies whose lines lie wholly within the state, where a part of the gross receipts is derived from passengers and freight coming from or destined to points without the state. Justices HARLAN, FULLER, and MCKENNA maintained that the Supreme Court of the United States should have accepted the interpretation which the Supreme Court of Texas placed upon the statute in question. In the words of Justice HARLAN, "The present decision, I fear, will seriously affect the taxing laws of many of the states, and so impair the powers of the several states, in matters of taxation, that they cannot compel their own corporations to bear their just proportion of such public burdens as can be met only by taxation."[37]

When it was maintained that due process of law was denied a Kentucky corporation by a tax upon its rolling stock permanently located in other states and employed in the prosecution of its business, Justice HOLMES remarked, "It seems to me that the result reached

[36] San Francisco Nat. Bank v. Dodge, 197 U. S. 70, at 108.
[37] Galveston Ry. Company v. Texas 210 U. S. 217, at 228, 230.

by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment."[38]

The state of Kansas decided to levy a charter fee upon all foreign corporations doing business within the state but on appeal to the Supreme Court by the Western Union Telegraph Company and the Pullman Company, it was decided that such a fee was a tax and as such an interference with interstate commerce. Justices HOLMES, FULLER, and MCKENNA dissented. Justice HOLMES' criticism was very frank. "I think that the tax in question, for I am perfectly willing to call it a tax, was lawful under all the decisions of this court until last week. From other points of view if I were at liberty to take them I should agree that it deserved the reprobation it received from the majority. But I have not heard and have not been able to frame any reason that I honestly can say seems to me to justify the judgment of the court in point of law."[39]

These opinions are sufficient to indicate the impression of Supreme Court justices that by judge-made restrictions the state's power to tax has been curtailed.

The federal courts have been inclined to extend their jurisdiction within what was formerly regarded as the exclusive field for the state governments. A corporation of Chicago appealed from an action of the board of equalization to prevent the assessment and collection of a tax on the ground that the procedure was in violation of the Fourteenth Amendment. The case was brought before the circuit court without any effort to take advantage of the right of appeal provided in the state courts. Justices HOLMES and MOODY felt constrained to dissent from the sanction which the Supreme Court accorded to the action of the lower court. "I should have thought," Justice HOLMES suggested, "that the action of the state was to be found in its constitution, and that no fault could be found with that until the authorized interpreter of that constitution, the supreme court, had said that it sanctioned the alleged wrong."[40]

When the Supreme Court was asked to grant a writ of habeas corpus to secure the release of the Attorney General of Minnesota from commitment by the circuit court of the United States for disobeying an order to cease criminal proceedings under a state statute, Justice HARLAN signified his disapproval of the majority decision upholding the action of the lower court in a lengthy opinion. The principle of the majority, according to Justice HARLAN, "would in-

[38] Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 211.

[39] Pullman Co. v. Kansas, 216 U. S. 56, at 77; See also Western Union Telegraph Company v. Kansas, 216. U. S. 1.

[40] Raymond v. Chicago Traction Co. 207 U. S. 20, at 41.

augurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate federal courts to supervise and control the official action of the states as if they were 'dependences' or provinces. * * * I am justified, by what this court has heretofore declared, in now saying that the men who framed the Constitution and who caused the adoption of the 11th amendment would have been amazed by the suggestion that a State of the Union can be prevented, by an order of a subordinate federal court, from being represented by its attorney general in a suit brought by it in one of its own courts."[41]

The readiness with which the federal courts have taken jurisdiction of rate cases involving the extent of state powers was also condemned by Justices FULLER and HARLAN in a recent rate case. In their opinion cases of this character are "precipitated into a Circuit Court of the United States" without even an honest effort to abide by the state procedure for the judicial determination of such cases. The opportunity for railroad companies to invoke the power of the federal courts to put a stop to proceedings in a state tribunal before the matter has been brought before the highest court of the state was thought to be without warrant in federal law.[42]

At another time the decision of the highest court of a state relative to a deed conveying the coal under a tract of land was held not to be binding upon federal courts in a similar action based on almost identical facts and circumstances. Justices HOLMES, WHITE and MCKENNA felt called upon to criticise the wide latitude accorded to Circuit Courts in dealing with state matters. Justice HOLMES said: "I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them do not follow what for all ordinary purposes is the law. * * * But I suppose it will be admitted on the other side that even the independent jurisdiction of the Circuit Courts of the United States is a jurisdiction only to declare the law. * * * It is not an authority to make it."[43]

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[41] Ex parte Young, 209 U. S. 123, at 175, 204.

[42] Prentis v. Atlantic Coast Line, 211 U. S. 210, 237; The Virginia State Corporation Commission, acting in the capacity of a Court, had determined railway passenger rates and an injunction had been granted by a Circuit Court. The Supreme Court in an opinion by Justice Holmes reversed the decree of the lower court on the ground that the case should first have been presented to the state courts. The minority concurred in reversing the judgment but dissented from the opinion.

[43] Kuhn v. Fairmont Coal Co. 215 U. S. 349, 370.

In *Tullock* v. *Mulvane* [44] where a bond was construed not by the local law of the state in which the action arose, but by a principle of law as determined by the Supreme Court, Justices HARLAN, FULLER and BROWN dissented. They noted that there has been a wide difference of opinion between this court and some of the state courts upon certain questions of general law. But it has never been supposed, they claim, that any one has such a vested interest in the views of this court upon questions of general law that he may complain of the refusal of a state court to accept those views. The growing tendency to exercise a judicial censorship over matters not strictly comprehended within federal law was sharply criticised.

In a case where an owner of real property abutting on a street in New York City sued to enjoin the use of an elevated railway unless the fee value of certain easements of light, air, and access were paid, the Supreme Court was about evenly divided on the issue. Justices MCKENNA, HARLAN, BREWER and DAY agreed on an opinion. Justice BROWN concurred in the result but not in the opinion. Justices HOLMES, FULLER, WHITE, and PECKHAM dissenting, asserted in an opinion by Justice HOLMES that the rights sustained by the majority were wholly a construction of the courts.[45] Continuing, he stated that the plaintiff in order to maintain his contention must claim that "he has a constitutional right not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. * * * The legislature and the court of appeals of New York said that the statute assailed was passed for the benefit of the public using the street, and I accept their view."[46] It was asserted that a right set up by implication through a decision of a court of justice of a state should not be held as final and superior to the legislative power of the state so as to render invalid a law passed in the interest of public policy.

When a decision of the Circuit Court relative to the validity of an Illinois trust act, granting an exception to agricultural products or live stock in the hands of the producer or raiser was reviewed, the act was held to be in violation of the clause of the Fourteenth Amendment, requiring the equal protection of the laws. Justice MCKENNA dissented from the opinion of the Court, declaring that classifications of this character are entirely proper and that a wide

[44] 184 U. S. 497, 522.
[45] Muhlker v. Harlem R. R. Co. 197 U. S. 544.
[46] Ibid., 574; See also Vicksburg v. Waterworks, 202 U. S. 453, at 472-3.

latitude must be left to the discretion of the legislature in dealing with such matters. Courts are not to determine, he thought, whether laws are arbitrary, oppressive or capricious:

"Indeed whether such combinations are evils or blessings, or to what extent either, is not a judicial inquiry. * * * To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action based upon those differences is legislative and cannot be reviewed by the judiciary."[47]

Powers of Congress. The control over acts of Congress in the exercise of judicial review has aroused opposition in some recent decisions. In the review of the conviction of Senator Burton for violation of the federal law against bribery, Justices BREWER, WHITE, and PECKHAM dissented from the opinion sustaining the conviction with the observation that "it seems clear the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated."[48] The minority contended that the matters charged against Senator Burton were not made offenses by the statute under which the indictment was found.

A Philippine Act made criminal the entry of a false statement by a public official. On a review of the Supreme Court of the Philippines affirming a conviction for falsification in accordance with this act, the Supreme Court held the act void as in violation of the clause of the Philippine Bill of Rights prohibiting cruel and unusual punishment. Justice WHITE, with the concurrence of Justice HOLMES, registered a vigorous dissent. He thought that if legislation defining and punishing crime is held repugnant to constitutional limitations because it "seems to the judicial mind not to have been sufficiently impelled by motives of reformation of the criminal," the legislative power is impotent to control crime. Since the decision subjected to judicial control the degree of severity with which authorized modes of punishment may be inflicted, it seemed to Justice WHITE "that the demonstration is conclusive that nothing will be left of the independent legislative power to punish and define crime."[49] The direct result of the decision, it was maintained, was to expand the judicial power by endowing it with a vast authority to control the legislative department in the exercise of its rightful discretion. The doctrine that "by judicial construction constitu-

[47] Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 571.

[48] Burton v. United States, 202 U. S. 344, 400.

[49] Weems v. U. S., 217 U. S. 349, 388, 411. See also Kellar v. U. S. 213 U. S. 138, 149.

tional limitations may be made to progress" so as to ultimately include that which was not intended was condemned.[50]

In defining the authority of the Interstate Commerce Commission, the majority opinion of the court in a series of cases was held to so restrict the powers of the Commission as to make it "a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce." "It has been left," continued Justice HARLAN, "with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character."[51] Justice DAY with the concurrence of Justices HARLAN and MCKENNA, dissented from a judgment against the right of the Interstate Commerce Commission to require testimony from railway managers, contending that too narrow a construction was given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations. It was the opinion of the minority that Congress had conferred a power on the Commission which was withheld by judicial decision.[52]

Labor Cases. No cases have aroused more bitterness nor presented graver issues than those having to do with the relations between labor and capital. Here, too, the charge of judicial legislation is brought against the highest interpreters of law under our system of government. In *Lochner* v. *New York* where the majority in an opinion by Justice PECKHAM maintained that there was no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor in the occupation of a baker,[53] Justices HARLAN, WHITE, DAY, and HOLMES dissented. "Whether or not this be wise legislation," they maintained, "it is not the province of the court to inquire. Under our system of government, the courts are not concerned with the wisdom or policy of legislation." They did not regard it as within the function of the court to determine what was sound economic theory in the realm of labor legislation, hence it was claimed that the court transcended its function when it assumed to annul the statute of the state of New York.[54] Justice HOLMES, who joined in the dissent, prepared a separate opinion which presented very clearly the prin-

[50] 217 U. S. 411; See opinion of four dissenting Justices in Kepner v. United States, 195 U. S., 100, at p. 134.

[51] Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144, 176.

[52] Harriman v. Interstate Commerce Commission 211 U. S. 407, 423.

[53] 198 U. S. 45.

[54] 198 U. S. 69.

ciple upon which cases of this character were held to belong to the legislative branch of the government:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like, tyrannical as this, and which equally with this interfere with the liberty to contract * * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics * * * But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."[55]

In *Adair* v. *United States* the majority held that personal liberty as well as the right of property was invaded without due process of law by the act making it a criminal offense against the United States for an interstate carrier to discharge an employee because of his membership in a labor organization. Justice McKenna dissented in an opinion which included the remark that Congress could not restrain the discharge of an employee and yet could, to enforce a policy of unrestrained competition between railroads, prohibit reasonable agreements between them as to the rates at which merchandise should be carried. The query was then raised whether rates and agreements might be restricted for the public welfare to the end that business might prosper while much needed relief to laboring men was prevented by prejudice and antagonism "intrenched impregnably in the Fifth Amendment of the Constitution against regulation in the public interest."[56] Justice Holmes also said that the statute was constitutional. "I could not pronounce it unwarranted," he said, "if Congress should decide that to foster a

[55] 198 U. S., 75, 76; Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties. See opinion of Justice Holmes, Continental Wall Paper Co., v. Voight & Sons, 212 U. S. 227, at 271.

[56] Adair v. United States 208 U. S. 161, at 189, 190.

strong union was for the best interest not only of the men but of the railroads and the country at large."[57]

Similarly the act of Congress intending to make the carrier liable for the injury or death of an employee which resulted from the negligence of a fellow servant was declared unconstitutional. Justices MOODY, HARLAN, MCKENNA and HOLMES dissented from the judgment of the court as announced in the opinion of Justice WHITE. Justice MOODY in the course of his opinion said:

"The Court has never exercised the mighty power of declaring the acts of a co-ordinate branch of the government void except where there is no possible and sensible construction of the act which is consistent with the fundamental organic law. The presumption that other branches of the Government will restrain themselves within the scope of their authority, and the respect which is due to them and their acts admits of no other attitude from this court. But the economic opinions of the judges and their views of the requirements of justice and public policy, even when crystallized into well settled doctrines of law, have no constitutional sanctity. They are binding upon succeeding judges, but while they may influence they cannot control legislators. Legislators have their own economic theories, their views of justice and public policy, and their views when embodied in written law must prevail."[58]

Justice HOLMES signified his dissent likewise on the ground that as it was possible to read the words in such a way as to save the constitutionality of the act, they should have been taken in that narrower sense.

Trust Cases. A series of cases resulting from the enforcement and interpretation of the Sherman law for the regulation of trusts and monopolies has brought forth an almost continuous line of dissents from Supreme Court Justices. The Sherman law was enacted in 1890 and when the prosecution of the Sugar Trust by the government was not upheld by the Supreme Court,[59] the enforcement of the law was allowed to lapse for almost six years, when the Trans-Missouri Freight Association was declared illegal.[60] The Court held that an agreement among railways doing interstate business for the purpose of fixing rates and fares was illegal as coming within the prohibitions of the Sherman act. Justice PECKHAM delivering the majority opinion, held that the act of 1890 was intended to include every contract or combination in restraint of trade. With respect

[57] Ibid., 190-192.
[58] Employers Liability Cases, 207 U. S. 463, at 537, 541.
[59] U. S. v. E. C. Knight Company, 156 U. S. 1.
[60] U. S. v. Trans-Missouri Freight Association, 166 U. S. 290.

to the argument that only contracts restraining trade unreasonably were intended to be comprehended within the terms of the act, Justice PECKHAM observed:

"We are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do."[61]

This view was subjected to trenchant criticism in the opinion of the minority delivered by Justice WHITE. The position of the majority was claimed to be equivalent to an assertion that the act of Congress itself was unreasonable, that an effort to include all contracts would result in prohibiting all trade. The construction now given the act, Justice WHITE maintained, "disregards the whole current of judicial authority and tests the right of contract by the conceptions of that right entertained at the time of the year-books, instead of by the light of reason and the necessity of modern society."[62] Regardless of this protest against the majority view, the Missouri case was upheld two years later with four Justices again dissenting,[63] and five years later in the *Northern Securities Case*.[64] Speaking for four members of the majority in the latter case, Justice HARLAN said that the court could not limit the law to unreasonable restraints without invading the field of the legislative department of the government. He maintained that if the law as enacted was detrimental to business and the country, Congress ought to remedy the defect and not the Court. Justice BREWER, though joining with the majority in giving judgment, took issue with the opinion of Justice HARLAN, contending that instead of including all contracts, reasonable or unreasonable, in restraint of trade, the ruling should have been that the contracts presented were unreasonable restraints, and as such within the scope of the law. He was apprehensive of the effect of the majority opinion upon the business of the country, fearing that it might "tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."[65]

Justice WHITE dissented from the majority view and with him

[61] Ibid., 340.
[62] 166 U. S. 343-374.
[63] United States v. Joint Traffic Association, 171 U. S. 505.
[64] Northern Securities Co. v. The United States, 193 U. S. 197.
[65] Ibid., 351.

were Chief Justice FULLER, Justices PECKHAM and HOLMES. The conclusions of the majority were held to be "utterly inconsistent with earlier decisions and practices of the government."

It was the adoption of the minority view as expressed in the *Trans-Missouri*, the *Joint Traffic Association* and the *Northern Securities* cases, as the judgment and opinion of the Court in the *Standard Oil* and *Tobacco Trust* cases that led to the conclusion of Justice HARLAN that the federal courts were usurping the legislative functions of the government. According to the first line of decisions the act of Congress was interpreted literally as prohibiting every contract or combination in restraint of trade and the policy or impolicy or wisdom or unwisdom of such a law was thrown back on Congress. The more recent cases have confined the law to unreasonable restraints only, and have confided to the judicial branch of the government the prerogative of determining what are unreasonable restraints. The legality or illegality of business combinations rests on the discretion of the judicial conscience. It is this conclusion that Justice HARLAN so emphatically opposed as inconsistent and impossible for the judicial branch of the government.

The limit of space allotted for an article does not permit a discussion of all of the cases in which a minority has rendered an emphatic protest against the rulings of the majority. A few instances are recorded in this period wherein the court is criticised for assuming too lenient an attitude toward legislation.[66] The preponderance of dissenting opinions is found, however, in opposition to the growing tendency toward judicial legislation. Making due allowance for the heat of controversy which provoked the foregoing opinions and for the fact that brief citations from extended opinions are likely to be somewhat misleading, there remains a sufficient basis for the contention that the federal courts of the United States have been prone to increase their jurisdiction at the expense of both state and federal legislatures.

One may well inquire what would have been the effect upon our political and industrial status if the opinions of those who wished to accord a wider latitude to legislative bodies had prevailed. It is natural to ask whether there would have been as much occasion for abuse of the states for failing to control corporate wealth, which on account of the lack of state control has been subjected more and more to federal regulation. Again it is worthy of conjecture whether the judiciary would today be criticised and attacked in many

[66] See Insular Cases, infra p. 37; Macdonald v. Dewey, 202 U.S. 510, 532; also Lottery case, 188 U. S. 321.

instances tending toward the curtailment of judicial powers, if a policy of closer adherence to the doctrine of confining judicial functions within narrower limits had impressed itself favorably upon the minds of a few additional justices. If the Fourteenth Amendment had been given a more limited application to state affairs, and a greater degree of discretion in the determination of rates and fares had been left in the hands of the legislatures, and the income tax law had become a part of our fiscal system, and the states had been accorded wider powers in matters of taxation and the control of corporations, and a more favorable attitude had been manifested in applying the law to labor organizations, and the anti-trust law had been held to be applicable to all contracts in restraint of trade, what would have been the results? According to the judgment of the dissenting opinions of federal justices all these things were possible and others too in the realm of social and industrial legislation, without any serious break in our principles of government and without unduly limiting the functions of the judiciary. We may well conclude from the opinions of the justices themselves that if it is necessary and indispensable in our system of government that judges shall expand and develop law and shall declare laws invalid which are deemed contrary to the federal Constitution, this high prerogative has been exercised in numerous instances when the issues involved might readily have been left to the legislative branch of government for final determination.

If judicial review of legislative acts is to remain a part of our system of government is it not likely that the dissenting justices have pointed the way toward a solution which without recourse to the recall of judges or without a limitation of jurisdiction will make judicial practice accord with the wishes of a people demanding a more democratic government? Since constitutions may be interpreted so as to favor a wider range of discretion in legislatures without doing violence to the English language or to the honor and integrity of Courts of Justice may we not expect that courts will more frequently defer to the judgment of legislatures when laws are attacked which involve social or economic policies?

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